United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74—1873

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

Docket No. 74-1873

-against-

PETER MARROCCO,

Appellant.

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether the trial judge erred by refusing to grant defense counsel's motion to suppress appellant's confession.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (the Honorable Jacob Mishler, Chief Judge) rendered on June 20, 1974, after a jury trial convicting Peter Marrocco of conspiracy to distribute heroin, in violation of 21 U.S.C. §§841(a)(1), 846, and three counts of distribution of heroin, in violation of 21 U.S.C. §841(a)(1), 18 U.S.C. §2.

Appellant was sentenced to imprisonment for a term of five years and to special parole for a term of five years on the conspiracy and each of the substantive counts, the sentences to run concurrently.

The Legal Aid Society Federal Defender Services Unit was assigned as counsel on appeal, pursuant to the Criminal Justice Act.*

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*Appellant was represented below by retained counsel, Louis Rosenthal, Esq.

Statement of Facts

Appellant, along with co-defendants Charles Siena, Grace Cassese, and Frank Cardia, was accused of participation in a scheme to distribute heroin.*

The primary government witness against appellant was Nicholas Marchese, a former narcotics addict and dealer turned government informer. Marchese testified that on July 4, 1973 he solicited co-defendant Cardia's assistance allegedly for the purpose of buying heroin for his (Marchese's) own further distribution activities (23**). In response, Cardia gave appellant's name to Marchese as the person who would make the sales (24).

According to Marchese, appellant called several days later and offered to sell one quarter ounce of heroin (26). A meeting was arranged, and on July 23 at 6:00 p.m., at the corner of Wilson Avenue and Trautman Street, Brooklyn,

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*Siena pleaded guilty to the conspiracy count. Cassese's case was severed on the government's motion, and the indictment against her was later dismissed on the government's motion. Cardia stood trial with appellant and was acquitted by the jury of all charges against him.

**Numbers in parenthesis refer to pages of the trial transcript.

Marchese, accompanied by undercover agent Daniel Martin of the Drug Enforcement Administration, and Marchese's girlfriend, Dorothy Lombardo, met appellant (31). Appellant produced the heroin, but balked at taking payment from Martin. Appellant was also wary of Marchese's suggestion that appellant deal only with Martin in the future, appellant suspecting Martin of being a law enforcement official (31-32). Assured by Marchese, appellant accepted the money from Martin (32-33).

Appellant, still suspicious of Martin, next called Marchese on August 2 and proposed a deal for one half ounce of heroin (33-34). On August 6, at 6:30 p.m., Marchese met appellant at DeKalb and Wyckoff Avenues, Brooklyn (35-36). Appellant was angry to see Martin, but took Marchese alone on a brief ride to pick up the heroin, for which Marchese paid $700 (39-40).

Marchese next testified that, following the August 6 sale, appellant called several times offering to sell one ounce of heroin (41-42). A meeting was arranged, and on August 22, at 6:30 p.m., Marchese, accompanied by Martin and Lombardo, arrived by car at DeKalb and Wyckoff Avenues (44). Marchese alone stood about the street until he saw appellant and co-defendant Cardia exit from a diner (45). Appellant was angry again to see Martin, but, according to Marchese, Cardia, for whom appellant sold the heroin, approved the

sale and drove appellant and Marchese to make the transaction (45). Within a few blocks, Cardia let Marchese out of the car (46). Marchese waited until appellant appeared in his (appellant's) own car and the transaction was consummated (46).

The remaining contacts between Marchese and appellant prior to appellant's arrest were limited to telephone calls during which several tentative deals were discussed (48-50).

Also testifying for the government was Agent Martin, whose description of the three sales was identical to that of Marchese's (89-104). Martin then sought to relate a confession to the second and third sales made by appellant following his arrest on September 21 (108-13). Defense counsel, however, made a motion to exclude the confession on the ground that it was had in violation of Miranda v. Arizona, 384 U.S. 436 (1966).

On the Miranda issue, Martin testified that appellant was arrested at home, then taken to the Westbury, Long Island, office of the Drug Enforcement Administration, where he was warned of his Fifth Amendment rights (113-117). According to Martin, appellant said that he understood his rights, whereupon Martin proceeded to question him (120). At this point, Martin admitted that appellant was reluctant to talk:

Q [Mr. Rosenthal]

You read him his rights?

A Yes.

Q And asked "Did you understand them?"

A Yes.

Q What did he say?

A "Yes."

Q Right after you asked him a question?

A Yes.

Q What did you ask? Do you remember?

A If he wanted to talk about the case at all.

Q What did he say?

A He said that he was worried, troubled.

Q What else did he say?

A That's the best I can remember.

Q Did you ask him another question after that?

A We asked about exhibits 2 and 3.

Q What did he say?

A He was still a little -- he didn't want to answer, really.

Q Did he say "I'm not talking"?

A No.

Q. How did you know he didn't want to answer?

A That's my impression.

(120)

Despite appellant's reluctance to talk, Martin persisted in asking questions and advising appellant that it would be best to cooperate (121). Five to ten minutes later, appellant confessed to the second and third sales (119).

Judge Mishler, after considering Martin's testimony, ruled that appellant's confession was admissible into evidence (123).*

Appellant offered no evidence on his own behalf.

After considering the evidence, the jury found appellant guilty as charged.

ARGUMENT

THE TRIAL JUDGE ERRED BY REFUSING TO GRANT DEFENSE COUNSEL'S MOTION TO SUPPRESS APPELLANT'S CONFESSION.

Testimony given by Agent Martin at the hearing on the motion to suppress appellant's confession established

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*Additional government witnesses were Agents Michael Yanniello, Eugene McElroy, and Robert Sears, all of the Drug Enforcement Administration, who described their observations from surveillance posts during the three transactions (134-164).

that, folloiwng his recitation of appellant's Miranda rights, he (Martin) perceived that appellant wished to remain silent:

Q [Mr. Rosenthal]

What did he say [in response to your questions]?

A He said that he was worried, troubled.

Q What else did he say?

A That's the best I can remember.

A Did you ask him another question after that?

A We asked about exhibits 2 and 3.

Q What did he say?

A He was still a little -- he didn't want to answer, really.

Q Did he say "I'm not talking"?

Q No.

Q How did you know he didn't want to answer?

A That's my impression.

Despite Martin's understanding that appellant, a young man of limited sophistication, "didn't want to answer," Martin persisted in asking questions until appellant confessed five to ten minutes later.

The agent's refusal to terminate interrogation, despite appellant' reluctance to answer questions, violated United States v. Collins, 462 F.2d 792 (2d Cir.), order for rehearing en banc vacated per curiam, 462 F.2d 801 (1972), as it interpreted Miranda v. Arizona, 384 U.S. 436 (1966):

> What Miranda requires is that interrogation must cease until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has voluntarily changed his mind.
>
> 462 F.2d at 802.

This procedure -- that interrogation must cease after an agent perceives that the arrestee wishes to remain silent, and that it cannot be resumed until new warnings are given and there is a reasonable basis for inferring a desire to talk -- is predicated on the Supreme Court's ruling in Miranda v. Arizona, supra, that a confession obtained by persistent questioning subsequent to a suspect's assertion of his right to silence is inherently involuntary:

> Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth

> Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of incustody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked.
>
> 384 U.S. at 473-74.
> (Emphasis added.)

Judge Mishler's ruling that appellant did not indicate a desire that the interrogation should cease was "clearly erroneous," and therefore requires reversal. United States v. D'Avanzo, 443 F.2d 1224 (2d Cir.), cert. denied, 404 U.S. 850 (1971). That appellant demanded a halt to the questioning is uncontroverted. Martin specifically testified that he knew appellant wished to remain silent.*

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*Under Miranda it is not necessary that a suspect actually say that he does not wish to make a statement. The "any manner" standard is satisifed when, for instance, a suspect asks for an attorney, United States v. Priest, 409 F.2d 490 (5th Cir. 1969); United States v. Davis, 344 F.Supp. 328 (S.D.N.Y. 1972); or merely shakes his head "no" in response to questions, United States v. Ambrus, 12 Cr. L. R., 2169 Army Ct. Mil. Rev., October 12, 1972.

Collins and Miranda were violated for not only did the interrogation continue after appellant's demand, but the agents continued the interrogation without new and adequate warnings and without any indication that appellant had changed his mind. In fact, he had no opportunity to change his mind because the questioning never stopped after his demand.*

The decision below must be reversed because a suspect's right to remain silent, when confronted by interrogation in an inherently coercive custodial situation, is the fundamental liberty guaranteed by the Fifth Amendment. That appellant invoked his right to silence is uncontroverted, and, as the Supreme Court noted in Miranda v. Arizona, supra:

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
>
> 384 U.S. at 458.

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*Similarly, the Court in United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971), condemned the behavior of the interrogating agent who, after being told by the suspect that he did not want to talk about a bank robbery, persisted in questioning the suspect about his activities before and after the robbery. The court decided that "The rule that interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect means just that and nothing less," 435 F.2d at 357. See also United States v. Barnes, 432 F.2d 89 (9th Cir. 1970); United States ex rel. Doss v. Bensinger, 463 F.2d 576 (7th Cir.), cert. denied, U.S. (1972); United States v. Vasquez, 13 Cr.L.R. 2079 (5th Cir., March 22, 1973).

Moreover, reversal is required even though appellant's confession related to the second and third sales and, inferentially, the conspiracy count, but not the first sale. The concurrent sentences imposed on appellant does not prevent this Court from reviewing the Miranda error. United States v. Delgado, 459 F.2d 471 (2d Cir. 1972). The "spill-over" effect of the confession requires a new trial where only proper evidence will be considered against appellant. Benton v. Maryland, 395 U.S. 784, 798 (1969).

CONCLUSION

The judgment below should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Service

August 30, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

William Epstein